IN THE

Supreme Court of the United States

October Term, 1976

No. 358

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

KING BROWN,

Respondent.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

MOTION TO GRANT THE PETITION FOR A WRIT OF CERTIORARI AND TO SET THE ARGUMENT IN THIS CASE IN TANDEM WITH THAT IN *UNITED STATES* v. *MARTIN LINEN SUPPLY CO.* (No. 76-120, CERT. GRANTED NOV. 1, 1976)

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The petitioner herein respectfully moves this Court for an order (1) granting the petition for a writ of certiorari, and (2) setting the argument in this case in tandem with that in *United States* v. *Martin Linen Supply Co.* (No. 76-120, cert. granted Nov. 1, 1976). As grounds for this motion the petitioner states:

The petition in this case presents the issue of when, if ever, a prosecutor may appeal after an indictment is dismissed upon a defendant's motion in the midst of trial. In

his memorandum supporting our petition, the Solicitor General has said that this issue "is currently the most important unresolved problem in the interpretation of the Double Jeopardy Clause." (Memorandum for the United States as Amicus Curiae, p. 2). On November 1, 1976 the Court granted a writ of certiorari in a case which may be thought to present a similar issue. *United States* v. *Martin Linen Supply Co.*, No. 76-120. The Court has not yet acted on the instant petition, and it may be that the Court is considering postponing any action on this petition until *Martin Linen* is decided. We respectfully urge the Court not to do so. In several respects *Martin Linen* is different from this case, and it is very possible that *Martin Linen* will be decided on a narrow ground not related to the important issue raised in this case. In any event, even if the Court does reach the broader issue in *Martin Linen*, we suggest that a resolution of that issue will be helped by considering the two cases together.

1. In *Martin Linen*, the jury could not agree upon a verdict, so the trial judge declared a mistrial, after which he entered a "judgment of acquittal" pursuant to F. R. Crim. P. 29 (c). In its petition to this Court, the Government urged that, in these circumstances, an appeal by the prosecutor is permissible because the judgment was entered by the trial judge not in the midst of trial but after the first trial had ended in a mistrial, in other words, at a time when the Government clearly had a right to retry the defendant. *See United States* v. *Perez*, 9 Wheat. 579 (1824). This Court has accepted a similar argument in *United States* v. *Sanford*, No. 75-1867, decided Oct. 12, 1976. The argument has no application in the case because here

there was no mistrial before the judge dismissed the indictment.

If the Court does decide *Martin Linen* on the narrow ground urged by the Government, then that decision will likely have no bearing on the broader and more difficult question raised in this case—whether a prosecutor may appeal after a judgment dismissing an indictment in the midst of a jury trial. Little, then, will be gained by postponing decision here; and much will be lost. Resolution of the issue raised in this case will be postponed at least until early 1978. In the meantime, the more than sixty state and local prosecutors in New York will have been precluded from appealing in circumstances authorized by the state legislature. Prosecutors, defendants, and judges in twenty-eight other jurisdictions will be left in doubt about the permissibility of state appeals in similar circumstances. (*See*, Petition, pp. 25-28).

2. If the Court rejects the narrow ground urged by the Government in *Martin Linen*, then that case will present a much broader issue—whether the Government may appeal if a court in a jury trial enters a judgment after jeopardy has attached but before any jury has determined the defendant's guilt or innocence. Even though the instant case also presents a similar issue, still there are differences between the two cases. In *Martin Linen* the trial court entered a "judgment of acquittal"; in this case, there was no "acquittal" either in name or in fact. In *Martin Linen*, the trial court's judgment was based on its view that evidence presented at the first trial was not sufficient to convict the defendant; in this case the judgment entered by the trial judge was based entirely on an erroneous legal conclusion about the meaning of a statute that defined the

crime of bribery. In *Martin Linen*, the defendant could not have sought before trial the relief it ultimately obtained; in this case, the defendant could have moved before trial for the same relief he later sought and got in the midst of trial. We cannot predict, of course, whether this Court will find any of these differences significant. However, we respectfully suggest that a comparison of the judgments entered by the trial courts in these two cases and a comparison of the circumstances in which they were entered will illuminate the general principles governing the state's right to appeal from judgments entered by trial courts during jury trials. Moreover, the interests of judicial economy will be served if the Court hears these cases at the same time instead of two times more than a year apart.

Conclusion

The petition for a writ of certiorari should be granted, and the case should be set for argument in tandem with* United States v. Martin Linen Supply Co. *(No. 76-120, cert. granted November 1, 1976).

Respectfully submitted,

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